

To: Tommy Hoyt, Chair, MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group

From: Richard Cram

Re: Memorandum re Prioritized Issues List—Issues #1-4

Date: August 29, 2019

1. Definition of marketplace facilitator/provider

State statutory definitions of “marketplace facilitator/provider” fall into two roughly equal categories: the “narrow” definition vs. the “broad” definition. Can more uniformity be achieved in this definition?

Please note that copies of state legislation enacting marketplace facilitator/provider sales/use tax collection requirements can be found on the MTC website at www.mtc.gov and downloaded from the web page for this work group.

Fifteen States have adopted a broad definition of marketplace facilitator/provider (CA IA ID KY MA ND NJ NV OH RI UT VA VT WA WV).

A recently enacted example of the broad definition is contained in Massachusetts 2019 H 4000:

“Marketplace facilitator”, a person that contracts with 1 or more marketplace sellers to facilitate for a consideration, regardless of whether deducted as fees from the transaction, the sale of the seller’s tangible personal property or services through a marketplace operated by the person, and engages: (a) directly or indirectly, through 1 or more related persons, in any of the following: (i) transmitting or otherwise communicating the offer or acceptance between the buyer and the seller; (ii) owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together; (iii) providing a virtual currency that buyers are allowed or required to use to purchase tangible personal property or services from the seller; or (iv) software development or research and development activities related to any of the activities described in subsection (b), if such activities are directly related to a physical or electronic marketplace operated by the person or a related person; and (b) in any of the following activities with respect to the seller’s tangible personal property or services: (i) payment processing services; (ii) fulfillment or storage services; (iii) listing tangible personal property or services for sale; (iv) setting prices; (v) branding sales as those of the marketplace facilitator; (vi) order taking; (vii) advertising or promotion; or (viii) providing customer service or accepting or assisting with returns or exchanges; provided, however, that a marketplace facilitator may also be a marketplace seller

Nineteen States and DC have adopted a narrow definition of marketplace facilitator/provider (AR AZ CO CT DC HI IL MD ME MN NE NM NY OK PA SC SD TX WI WY).

A recently enacted example of the narrow definition is contained in Texas 2019 HB 1525:

"Marketplace provider" means a person who owns or operates a marketplace and directly or indirectly processes sales or payments for marketplace sellers.

Exclusions from definition of marketplace facilitator/provider

Should the definition of “marketplace facilitator/provider” contain exclusions for: advertising, payment processing, food delivery services, online travel companies, others?

The following states have adopted exclusions from the definition of marketplace facilitator/provider for: advertising (CA CO MD NV OH VA WA); payment processors (AZ IN MA MD NE UT VA WV); delivery businesses (CA MD); other (NV—travel packages, car rental, accommodations; MD—peer-to-peer car sharing, NY—car rentals).

Examples are provided below.

Advertising Exclusion

California 2019 AB 92:

6041.1. Newspapers, internet websites, and other entities that advertise tangible personal property for sale, refer purchasers to the seller by telephone, internet link, or other similar means to complete the sale, and do not participate further in the sale are not facilitating a sale under this chapter.

Colorado HB 19-1240:

(b) A "MARKETPLACE FACILITATOR" DOES NOT INCLUDE A PERSON THAT EXCLUSIVELY PROVIDES INTERNET ADVERTISING SERVICES OR LISTS PRODUCTS FOR SALE, AND THAT DOES NOT OTHERWISE MEET THE DEFINITION SET FORTH IN SUBSECTION (5.9)(a) OF THIS SECTION.

Payment Processing Exclusion

Examples of statutory exclusions for payment processing are provided below.

Arizona 2019 HB 2757 (exclusion from definition of marketplace facilitator):

(b) DOES NOT INCLUDE A PAYMENT PROCESSOR BUSINESS THAT IS APPOINTED TO HANDLE PAYMENT TRANSACTIONS FROM VARIOUS CHANNELS, SUCH AS CHARGE CARDS, CREDIT CARDS AND DEBIT CARDS, AND WHOSE SOLE ACTIVITY WITH RESPECT TO MARKETPLACE SALES IS TO HANDLE TRANSACTIONS BETWEEN TWO PARTIES.

Indiana 2019 HEA 1001 p. 136 (exclusion from definition of marketplace facilitator):

(b) The term does not include a payment processor business: (1) that is appointed by a merchant to handle payment transactions from various channels, including credit cards and debit cards; and (2) whose sole activity with respect to marketplace sales is to handle payment transactions between two (2) parties.

Examples of states with multiple exclusions from definition of marketplace facilitator/provider are provided below.

Maryland 2019 HB 1301 (exclusions for payment processors, advertising, peer-to-peer car sharing, delivery service company):

(2) “MARKETPLACE FACILITATOR” DOES NOT INCLUDE:
(I) A PLATFORM OR FORUM THAT EXCLUSIVELY PROVIDES INTERNET ADVERTISING SERVICES, INCLUDING LISTING PRODUCTS FOR SALE, IF THE PLATFORM OR FORUM DOES NOT ALSO ENGAGE, DIRECTLY OR INDIRECTLY, IN COLLECTING PAYMENT FROM A BUYER AND TRANSMITTING THAT PAYMENT TO THE VENDOR;
(II) A PAYMENT PROCESSOR BUSINESS APPOINTED BY A VENDOR TO HANDLE PAYMENT TRANSACTIONS FROM CLIENTS, INCLUDING CREDIT CARDS AND DEBIT CARDS, WHOSE ONLY ACTIVITY WITH RESPECT TO MARKETPLACE SALES IS TO HANDLE TRANSACTIONS BETWEEN TWO PARTIES;
(III) A PEER-TO-PEER CAR SHARING PROGRAM, AS DEFINED IN § 19–520 OF THE INSURANCE ARTICLE; OR
(IV) A DELIVERY SERVICE COMPANY THAT DELIVERS TANGIBLE PERSONAL PROPERTY ON BEHALF OF A MARKETPLACE SELLER THAT IS ENGAGED IN THE BUSINESS OF A RETAIL VENDOR AND HOLDS A LICENSE ISSUED UNDER SUBTITLE 7 OF THIS TITLE.

Nevada 2019 AB 445 (exclusion for advertising, vacation or travel packages, car rentals):

2. The term [marketplace facilitator] does not include:
(a) A person who provides Internet advertising services,

including, without limitation, the listing of products for sale, if the person does not directly or indirectly or through an affiliate:

(1) Transmit or otherwise communicate an offer or acceptance of a retail sale of tangible personal property between a marketplace seller and a purchaser; and

(2) Do one or more of the activities listed in paragraph (b) of subsection 1.

(b) A person who arranges, books or otherwise facilitates, for a commission, fee or other consideration, vacation or travel packages or rental car or other travel reservations or accommodations through a marketplace owned, operated or controlled by the person. The exclusion set forth in this paragraph applies only with respect to the arranging, booking or facilitation, for a commission, fee or other consideration, of the lease or rental of a passenger car, as defined in NRS 482.087.

Other miscellaneous exclusions are provided below.

New York 2019 S. 1509 Part G exclusion for car rentals:

For purposes of this paragraph, a "sale of tangible personal property" shall not include the rental of a passenger car as described in section eleven hundred sixty of this chapter but shall include a lease described in subdivision(i) of section eleven hundred eleven of this article.

Ohio 2019 HB 166 hotel exclusion:

(3) The subject of the sale is tangible personal property or services other than lodging by a hotel that is or is to be furnished to transient guests.

Washington 2019 SSB 5581, exclusion for travel agency services at Section 105 amending 82.08.010(15)(b)(i):

(b)(i) "Marketplace facilitator" does not include: . . . or (B) A person with respect to the provision of travel agency services or the operation of a marketplace or that portion of a marketplace that enables consumers to purchase transient lodging accommodations in a hotel or other commercial transient lodging facility. (ii) The exclusion in this subsection (15)(b) does not apply to a marketplace or that portion of a marketplace that facilitates the retail sale of transient lodging accommodations in homes, apartments, cabins, or other residential dwelling units.

California exclusion in 2019 SB 92 for delivery network companies, but allowing such service to elect to be a marketplace facilitator with the obligation to collect sales/use tax:

6041.5. (a) Notwithstanding Section 6041, a person that is a delivery network company is not a marketplace facilitator for purposes of this chapter.

(b) For purposes of this section, all of the following definitions shall apply:

(1) "Delivery network company" means a business entity that maintains an internet website or mobile application used to facilitate delivery services for the sale of local products.

(2) "Delivery services" means the pickup of one or more local products from a local merchant and delivery of the local products to a customer. "Delivery services" do not include any delivery requiring over 75 miles of travel from the local merchant to the customer.

(3) "Local merchant" means a third-party merchant, including, but not limited to, a kitchen, restaurant, grocery store, retail store, convenience store, or business of another type, that is not under common ownership or control with the delivery network company.

(4) "Local product" means any item, including food, other than freight, mail, or a package to which postage has been affixed.

(c) Notwithstanding subdivision (a), a delivery network company that meets the definition set forth in subdivision (b) of Section 6041 may elect, in a reasonable manner and duration prescribed by the department, to be deemed a marketplace facilitator pursuant to this chapter. Consistent with this section, the department shall adopt regulations that establish the criteria for obtaining and retaining an election to be a marketplace facilitator pursuant to this subdivision.

Retail Industry Leaders Association (RILA) Model suggested exclusions from the definition:

A. "Marketplace facilitator" means a person that:

1. Contracts with marketplace sellers to facilitate for consideration, regardless of whether deducted as fees from the transaction, the sale of the marketplace seller's products through a physical or electronic marketplace operated by the person; and,
2. Either directly or indirectly through agreements or arrangements with third parties, collects the payment from the purchaser and transmits the payment to the marketplace seller.
3. A "marketplace facilitator" does not include: a) a platform or forum that exclusively provides advertising services, including listing products for sale, so long as the advertising service platform or forum does not also engage directly or indirectly through one or more affiliated persons in the activities described in A.1. and A.2. of this section; (b) a payment processor business appointed by a merchant to handle payment transactions from various channels, such as credit cards and

debit cards, and whose sole activity with respect to marketplace sales is to handle transactions between two parties; or (c) a derivatives clearing organization, a designated contract market, foreign board of trade or swap execution facility, registered with the Commodity Futures Trading Commission (“CFTC registered platforms”), and any clearing members, futures commission merchants or brokers when using the services of CFTC registered platforms.

4. [OPTIONAL—If sales tax in state applies to hotel/lodging, consider adding following language to exclude from definition of “marketplace facilitator”: “A person is not a marketplace facilitator with respect to the sale or charges for rooms, lodgings or accommodations described in (cite code section) if the rooms, lodgings or accommodations are provided by a hotel, motel, inn, or other place that is a [registered seller] under (cite code section) and the [registered seller] provides the rooms, lodgings or accommodations for occupancy under a brand belonging to such person.]

2. Who is the retailer?

Should marketplace facilitator/providers have the same rights as retailers under state law, such as claiming price adjustments, bad debt deductions, vendor compensation (if provided by the state), etc.?

The following states consider the marketplace facilitator/provider to be the seller/retailer/vendor concerning facilitated sales: AR CA CO CT DC HI IL MA ME ND NE NJ NY OH RI SD TX UT VT WA WI WV WY.

Example statutes are provided below.

Arizona HB 2757 defines “person” to include: MARKETPLACE FACILITATOR OR REMOTE SELLER, and “sale” is defined to include: AND TRANSACTIONS FACILITATED BY A MARKETPLACE FACILITATOR ON BEHALF OF A MARKETPLACE SELLER.

California 2019 AB 147:

6042. A marketplace facilitator shall be considered the seller and retailer for each sale facilitated through its marketplace for purposes of determining whether the marketplace facilitator is required to register with the department under Chapter 2 (commencing with Section 6051) or Chapter 3 (commencing with Section 6201), in addition to each sale for which the marketplace facilitator is the seller or retailer or both under Chapter 1 (commencing with Section 6001).

6043. A marketplace facilitator that is registered with the department or required to register with the department under Chapter 2 (commencing with Section 6051) or Chapter 3 (commencing with Section 6201) and that facilitates a retail sale of tangible personal property by a marketplace seller is the retailer selling or making the sale of the tangible personal property sold through its marketplace for purposes of this part.

Colorado HB 19-1240:

(8) "Retailer" or "vendor" means a person doing business in this state including a remote seller, known to the trade and public as such, and selling to the user or consumer, and not for resale. THE TERM INCLUDES A MARKETPLACE FACILITATOR, A MARKETPLACE SELLER, AND A MULTICHANNEL SELLER DOING BUSINESS IN THIS STATE.

(1.5) (a) WITH RESPECT TO SALES OF TANGIBLE PERSONAL PROPERTY, COMMODITIES, OR SERVICES MADE BY MARKETPLACE SELLERS IN OR THROUGH A MARKETPLACE FACILITATOR'S MARKETPLACE, A MARKETPLACE FACILITATOR HAS ALL OF THE LIABILITIES, OBLIGATIONS, AND RIGHTS OF A RETAILER OR VENDOR UNDER SUBSECTION (1) OF THIS SECTION AND THIS ARTICLE 26 WHETHER OR NOT THE MARKETPLACE SELLER, BECAUSE THE MARKETPLACE SELLER IS A MULTICHANNEL SELLER: (I) HAS OR IS REQUIRED TO HAVE A LICENSE UNDER SECTION 39-26-103; OR (II) WOULD HAVE BEEN REQUIRED TO COLLECT AND REMIT TAX UNDER THIS ARTICLE 26 HAD THE SALE NOT BEEN MADE IN OR THROUGH THE MARKETPLACE.

Hawaii 2019 SB 396:

"1237- Marketplace facilitators. (a) A marketplace facilitator shall be deemed the seller of tangible personal property, intangible property, or services and the seller on whose behalf the sale is made shall be deemed to be making a sale at wholesale pursuant to section 237-4.

Illinois 2019 SB 689:

(b) Beginning on January 1, 2020, a marketplace facilitator who meets either of the following criteria is considered the retailer of each sale of tangible personal property made on the marketplace:

(1) the cumulative gross receipts from sales of tangible personal property to purchasers in Illinois by the marketplace facilitator and by marketplace sellers are \$100,000 or more; or

(2) the marketplace facilitator and marketplace sellers cumulatively enter into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.

(c) A marketplace facilitator that meets either of the thresholds in subsection (b) of this Section is considered the retailer of each sale made through its marketplace and is liable for collecting and remitting the tax under this Act on all such sales. The marketplace facilitator has all the rights and duties, and is required to comply with the same requirements and procedures, as all other retailers maintaining a place of business in this State who are registered or who are required to be registered to collect and remit the tax imposed by this Act.

Indiana 2019 HEA 1001:

The marketplace facilitator shall also be considered a retail merchant for purposes of section 3 of this chapter.

....

Sec. 18. (a) A marketplace facilitator shall be considered the retail merchant of each retail transaction (including a retail transaction under section 4 of this chapter) that is facilitated for sellers on its marketplace when it does any of the following on behalf of the seller: (1) Collects the sales price or purchase price of the seller's products. (2) Provides access to payment processing services, either directly or indirectly. (3) Charges, collects, or otherwise receives fees or other consideration for transactions made on its electronic marketplace. (b) Regardless of whether a transaction under subsection (a) was made by the marketplace facilitator on its own behalf or facilitated on behalf of a seller, a marketplace facilitator is required to do the following with each retail transaction made on its marketplace: (1) Collect and remit the gross retail tax, even if a seller for whom a transaction was facilitated: (A) does not have a registered retail merchant certificate; or (B) would not have been required to collect gross retail tax had the transaction not been facilitated by the marketplace facilitator. (2) Comply with all applicable procedures and requirements imposed under this article as the retail merchant in such transaction.

Massachusetts 2019 H 4000:

“Retailer”, includes (i) every person, including a marketplace seller, engaged in the business of making sales at retail; (ii) every person engaged in the making of retail sales at auction of tangible personal property whether owned by such person or others; (iii) every marketplace facilitator engaged in facilitating retail sales of tangible personal property or services, irrespective of whether such tangible personal property is owned by the facilitator or a marketplace seller and irrespective of whether such services are performed by the facilitator or a marketplace seller; (iv) every person, including a marketplace seller or marketplace facilitator, engaged in the business of making sales for storage, use or other consumption, or in the business of making sales at auction of tangible personal property whether owned by such person or others for storage, use or other consumption;

Nebraska 2019 LB 284:

Includes in definition of “seller” : (f) Every person operating a multivendor marketplace platform that (i) acts as the intermediary by facilitating sales between a seller and the purchaser or that engages directly or indirectly through one or more affiliated persons in transmitting or otherwise communicating the offer or acceptance between the seller and purchaser and (ii) either directly or indirectly through agreements or arrangements with third parties, collects payment from the purchaser and transmits payment to the seller.

New York 2019 S 1509 Part G:

(1) "Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; ~~and~~ every operator of a hotel; and every marketplace provider with respect to sales of tangible personal property it facilitates as described in paragraph one of subdivision (e) of section eleven hundred one of this article.

(1)(1) A marketplace provider with respect to a sale of tangible personal property it facilitates: (A) shall have all the obligations and rights of a vendor under this article and article twenty-nine of this chapter and under any regulations adopted pursuant thereto, including, but not limited to, the duty to obtain a certificate of authority, to collect tax, file returns, remit tax, and the right to accept a certificate or other documentation from a customer substantiating an exemption

or exclusion from tax, the right to receive the refund authorized by subdivision (e) of this section and the credit allowed by subdivision (f) of section eleven hundred thirty-seven of this part subject to the provisions of such subdivisions; and (B) shall keep such records and information and cooperate with the commissioner to ensure the proper collection and remittance of tax imposed, collected or required to be collected under this article and article twenty-nine of this chapter.

North Dakota 2019 SB 2338:

Notwithstanding any other provision of law, any marketplace facilitator facilitating sales of tangible personal property or other products or services subject to tax under section 57 - 39.2 - 02.1, which does not have a physical presence in this state, is a retailer subject to chapters 57 - 39.2 and 57 - 40.2 and shall remit sales or use tax if the marketplace facilitator facilitates or makes sales through the marketplace that, when the sales are combined, meet the threshold amount in section 57 - 39.2 - 02.2. A marketplace facilitator exceeding the sales threshold shall obtain a permit under section 57 - 39.2 - 14, and begin collecting the tax on sales during the following calendar year or beginning sixty days after the threshold is met, whichever is earlier. A marketplace facilitator shall be considered the retailer of each sale the facilitator facilitates on its forum for a marketplace seller. Each marketplace facilitator shall:

- a. Be required to collect and remit for each sale any tax imposed under chapters 57 - 39.2 and 57 - 40.2 .
- b. Be responsible for all obligations imposed under chapter 57 - 39.2 as if the marketplace facilitator was the retailer of the sale.
- c. In accordance with the provisions of section 57 - 39.2 - 10, keep such records and information as may be required by the tax commissioner to ensure proper collection and remittance of tax.
- d. Certify to its marketplace sellers that it will collect and remit state and local sales and use tax on sales of tangible personal property or other products or services subject to tax under section 57 - 39.2 - 02.1 made through the marketplace. A marketplace seller that accepts a marketplace facilitator's collection certificate in good faith may exclude sales made through the marketplace from the marketplace seller's return of gross receipts under section 57 - 39.2 - 11 .

Ohio 2019 HB 166:

A marketplace facilitator shall be treated as the "seller" with respect to all sales facilitated by the marketplace facilitator on behalf of one or more marketplace sellers on and after the first day of the first month that begins at least thirty days after the marketplace facilitator first has substantial nexus

with this state.

Sec. 5741.07. Except as otherwise provided in section 5741.11 of the Revised Code, a marketplace facilitator that is treated as a seller pursuant to division (E) of section 5741.01 of the Revised Code has the same rights and obligations under this chapter as other sellers. Such obligations include registering with the tax commissioner under section 5741.17 of the Revised Code and collecting and remitting the taxes levied under this chapter on sales facilitated by the marketplace facilitator in accordance with section 5741.04 of the Revised Code. A marketplace facilitator's rights and obligations regarding a sale are not affected by the amount of the price paid by the consumer that will accrue to or benefit the marketplace facilitator as compared to the marketplace seller for which the sale is facilitated, or by whether or not such marketplace seller has substantial nexus with this state, registers with the tax commissioner under section 5741.17 of the Revised Code, or collects and remits taxes on sales not facilitated by a marketplace facilitator in accordance with section 5741.04 of the Revised Code.

Rhode Island 2019 S 251:

(iii) A marketplace facilitator with respect to a sale of tangible personal property, prewritten computer software delivered electronically by load and leave, vendor-hosted prewritten software, and/or taxable services it facilitates: (A) shall have all the obligations and rights of a retailer under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws and under any regulations adopted pursuant thereto, including, but not limited to, the duty to obtain a certificate of authority, to collect tax, file returns, remit tax, and the right to accept a certificate or other documentation from a customer substantiating an exemption or exclusion from tax, the right to receive a refund or credit allowed by law; and (B) shall keep such records and information and cooperate with the tax administrator to ensure the proper collection and remittance of tax imposed, collected, or required to be collected under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws.

Washington 2019 SSB 5581, Section 105 amending definition of “seller” in RCW 82.08.010 (2)(a)(ii) to include marketplace facilitators:

(ii) "Seller" includes marketplace facilitators, whether making sales in their own right or facilitating sales on behalf of marketplace sellers.

Texas 2019 HB 1525:

- (b) "Seller" and "retailer" include:
... and
(7) a person who is a marketplace provider under
Section 151.0242.

(b) Except as otherwise provided by this section, a marketplace provider has the rights and duties of a seller or retailer under this chapter with respect to sales made through the marketplace.

Utah 2019 SB 168:

(b) "Seller" includes a marketplace facilitator.

Vermont 2019 H 536:

(14) "Persons required to collect tax" or "persons required to collect any tax imposed by this chapter" means every vendor of taxable tangible personal property or services, and every recipient of amusement charges. These terms also include marketplace facilitators with respect to retail sales made on behalf of a marketplace seller.

Virginia 2019 H 1722:

D. 1. A marketplace facilitator shall be considered a dealer for purposes of this chapter and shall collect the tax imposed by this chapter on all transactions that it facilitates through its marketplace. 2. No marketplace seller shall collect sales and use tax on a transaction made through a marketplace facilitator's marketplace.

Wisconsin 2019 AB 251:

77.585 **(1g)** A marketplace provider who collects and remits tax on behalf of a marketplace seller under s. 77.523 may claim a bad debt deduction under this subsection if either the marketplace provider or marketplace seller may claim a deduction under section 166 of the Internal Revenue Code for the sales transaction. A marketplace seller may not claim a deduction under this subsection for the same transaction.

The RILA Model suggested the following provision:

A marketplace facilitator has the same rights and duties as a seller.

The following states consider marketplace facilitator/provider to be acting on behalf of the marketplace seller, who is the retailer/seller with facilitated sales: AZ IA WV.

Example statutes are provided below.

West Virginia 2019 HB 2813:

Collection of tax by marketplace facilitators and referrers. (a) Duty to collect tax. — For purposes of §11-15A-1 et seq. of this code and for collection of use tax required under §11-15A-6 and §11-15A-6b of this code, the phrase retailer engaging in business in this state also means and includes a remote seller, marketplace facilitator, or referrer that meets the requirements of subsection (e) of this section. A marketplace facilitator or referrer is required to collect and remit the use tax on all taxable sales of tangible personal property, [custom software] or services: (i) Made by the marketplace facilitator or referrer; or (ii) facilitated for marketplace sellers, to purchasers in this state. (b) Agency. — For purposes of §11-15A-6b of this code, a marketplace facilitator or referrer is deemed to be an agent of any marketplace seller making retail sales through the marketplace facilitator's physical or electronic marketplace or directly resulting from a referral of the purchaser by the referrer.

Refund provisions

When a state includes marketplace facilitator/providers within its definition of seller/retailer/vendor, then the refund provisions applicable to a seller/retailer/vendor should apply to marketplace facilitators/providers. Should refund procedures be specified for marketplace facilitators/providers? Who does the customer file a refund claim with and who handles the refund claim in a marketplace sale?

The following states provide provisions concerning refunds in marketplace sales: AZ CT IN MD UT. Examples are provided below.

Arizona refund procedure in 2019 HB 2757:

F. REFUND CLAIMS RELATED TO AN OVERPAYMENT OF TRANSACTION PRIVILEGE TAX COLLECTED BY A MARKETPLACE FACILITATOR SHALL BE FILED AS PRESCRIBED BY SECTION 42-1118. IF A REFUND CLAIM IS DENIED, THE CLAIMANT MAY APPEAL THE DENIAL PURSUANT TO CHAPTER 1, ARTICLE 6 OF THIS TITLE.

Connecticut 2018 SB 417, Section 4(d):

Any purchaser of tangible personal property or taxable services who overpaid sales or use tax to a marketplace facilitator may submit a claim for refund with the commissioner

Indiana 2019 HEA 1001, p. 143 refund procedures:

Sec. 13.5. Any purchaser of tangible personal property or services who has overpaid gross retail or use tax to a marketplace facilitator: (1) may file a claim for refund with the department; and (2) shall not have a cause of action against the marketplace facilitator for the recovery of the overpayment. A purchaser wishing to file a claim for refund under subdivision (1) must file the claim on the form, in the manner, and with the supporting documentation prescribed by the department. If a purchaser properly files a valid claim for refund, the department shall refund to the purchaser the amount of the overpayment of gross retail or use tax with respect to the transaction.

Maryland 2019 HB 1301:

(C) A MARKETPLACE FACILITATOR, OR OTHER APPROPRIATE PARTY, SHALL REFUND TO A BUYER THE PROPORTIONATE AMOUNT OF SALES AND USE TAX THAT THE BUYER HAS PAID IF: (1) (I) A SALE IS RESCINDED OR CANCELED; OR (II) THE PROPERTY SOLD IS RETURNED TO THE MARKETPLACE FACILITATOR OR MARKETPLACE SELLER; AND (2) THE PURCHASE PRICE IS WHOLLY OR PARTIALLY REPAID OR CREDITED.

Utah 2019 SB 168:

(10) (a) A purchaser of tangible personal property, a product transferred electronically, or a service may file a claim for a refund with the marketplace facilitator if the purchaser overpaid sales and use taxes imposed under this chapter.

3. Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection

Enacted marketplace facilitator/provider collection laws generally provide that the marketplace facilitator/provider is the party to be audited, not the marketplace seller, on facilitated sales transactions. However, some of those laws also impose recordkeeping requirements on marketplace sellers for facilitated sales and subject the marketplace seller to audit under certain circumstances (such as when the marketplace facilitator/provider

can establish that its failure to collect was due to erroneous information provided by the marketplace seller). Such laws may include liability protection for the marketplace facilitator/provider when the failure to collect is due to incorrect or insufficient information provided by the marketplace seller, in which case the marketplace seller assumes the liability for failure to collect. Some of those laws only include such liability protection for “incorrect” information provided by the marketplace seller. Do clearer, simpler standards need to be put in place (such as defining the specific information the marketplace facilitator/provider can rely on for the marketplace seller to provide, and vice versa) in assigning liability for failure to collect between the marketplace facilitator/provider and the marketplace seller and in determining which party is subject to audit under what circumstances?

Audit Exposure

For states that include the marketplace facilitator/provider within their definitions of “seller/retailer/vendor,” that would necessarily include the obligation to comply with those requirements falling upon a “seller/retailer/vendor,” such as registration, return filing, recordkeeping, and being subject to audit.

Many states explicitly provide that the marketplace facilitator/provider is subject to audit on the facilitated transactions that it is required to collect sales/use tax on, and that the marketplace seller is not subject to audit on those transactions. In some of those provisions, the marketplace seller may be subject to audit in situations where the marketplace facilitator/provider is seeking liability relief from failure to collect, due to marketplace seller errors. Examples are provided below.

Kentucky 2019 SB 354:

(4) (a) The marketplace provider shall be subject to audit on all sales made on its own behalf and on all sales facilitated by the marketplace provider. (b) The marketplace retailer shall be relieved of all liability for the collection and remittance of the sales or use tax on sales facilitated by the marketplace provider.

Maine 2019 HP 1064:

I. Nothing in this section prohibits the State Tax Assessor from auditing marketplace facilitators or marketplace sellers, except the assessor is prohibited from auditing: (1) Marketplace facilitators to the extent that the marketplace seller collected and remitted sales and use tax and was audited with respect to the relevant sales; or (2) Marketplace sellers to the extent that the marketplace facilitator

collected and remitted sales and use tax and was audited with respect to the relevant sales unless the marketplace facilitator is seeking relief of liability under paragraph E. J. If a marketplace facilitator pays sales or use tax on a retail sale facilitated for a marketplace seller as a result of an audit or otherwise, the marketplace facilitator may recover the tax and any associated interest and penalties from the marketplace seller within the applicable statutory period following the date of payment by the marketplace facilitator.

Maryland 2019 HB 1301:

- (1) (1) IF THE COMPTROLLER CONDUCTS AN AUDIT FOR COMPLIANCE WITH THIS SECTION, THE COMPTROLLER MAY AUDIT ONLY THE MARKETPLACE FACILITATOR FOR SALES MADE BY A MARKETPLACE SELLER THAT ARE FACILITATED BY THE MARKETPLACE FACILITATOR.
- (2) (2) THE COMPTROLLER MAY NOT AUDIT THE MARKETPLACE SELLER FOR SALES FACILITATED BY THE MARKETPLACE FACILITATOR FOR WHICH THE MARKETPLACE FACILITATOR COLLECTED OR SHOULD HAVE COLLECTED THE SALES AND USE TAX DUE.

Minnesota 2019 HF 5:

- (a) A marketplace provider is subject to audit on the retail sales it facilitates if it is required to collect sales and use taxes and remit them to the commissioner under subdivision 2, paragraphs (b) and (c).

New Mexico 2019 HB 6:

- B. The department shall audit a marketplace provider, but not a marketplace seller, with respect to gross receipts from transactions facilitated by a marketplace provider and for which the marketplace seller may claim a deduction pursuant to Section 36 of this 2019 act, unless an audit of the marketplace seller is necessary to determine the correct amount of tax due, including examining the marketplace seller:
 - (1) to determine compliance with Section 36 of this 2019 act;
 - (2) to determine if the marketplace provider should be relieved of liability pursuant to Subsection C of Section 7-9-5 NMSA 1978; or
 - (3) to enforce any other provision of the

Tax Administration Act.

North Dakota 2019 SB 2338:

[The marketplace facilitator shall] be subject to audit by the tax commissioner with respect to all retail sales for which it is required to collect and pay the tax imposed under chapters 57 - 39.2 and 57 - 40.2. If the tax commissioner audits the marketplace facilitator, the tax commissioner is prohibited from auditing the marketplace seller for the same retail sales unless the marketplace facilitator seeks relief under subsection 4 .

Ohio 2019 HB 166:

(B) The commissioner may audit only the marketplace facilitator for sales with respect to which the marketplace facilitator is treated as the seller pursuant to division (E) of section 5741.01 of the Revised Code and may not audit the marketplace seller on behalf of which the sale was facilitated. This division does not absolve a marketplace seller or the purchaser from personal liability under division (B) of section 5741.11 of the Revised Code for taxes that are not properly collected, paid, or remitted due to the inability of the marketplace facilitator to obtain accurate information about the sale from the marketplace seller.

Rhode Island 2019 S. 251:

(iv) A marketplace facilitator shall be subject to audit by the tax administrator with respect to all retail sales for which it is required to collect and pay the tax imposed under Chapters 18 and 19 of Title 44 of the Rhode Island General Laws. Where the tax administrator audits the marketplace facilitator, the tax administrator is prohibited from auditing the marketplace seller for the same retail sales unless the marketplace facilitator seeks relief under this subsection (iv).

Virginia 2019 H 1722:

F. A marketplace facilitator is the sole entity subject to audit by the Department for sales and use tax collection for all transactions facilitated by the marketplace facilitator unless (i) the marketplace facilitator can demonstrate that its failure to collect the proper tax was due to incorrect information provided by the marketplace seller or (ii) the marketplace seller is subject to a waiver granted pursuant to subdivision D 3.

Liability Protection

States that have enacted laws requiring marketplace facilitators/providers to collect sales/use tax on facilitated sales generally include provisions protecting marketplace facilitators/providers from liability for failure to collect in certain circumstances. Several states (see AZ CO ME NV NM RI VT) provide that if the marketplace facilitator/provider can demonstrate that the failure to collect was due to “erroneous” or “incorrect” information provided by an unaffiliated marketplace seller to the marketplace facilitator/provider, then the marketplace facilitator/provider is relieved of liability, and such liability falls upon the marketplace seller. Examples of such statutes are provided below.

Arizona 2019 HB 2757:

A. A MARKETPLACE FACILITATOR IS NOT LIABLE FOR FAILING TO PAY THE CORRECT AMOUNT OF TRANSACTION PRIVILEGE TAX FOR A MARKETPLACE SELLER'S SALES THROUGH THE MARKETPLACE FACILITATOR'S MARKETPLACE TO THE EXTENT THAT THE MARKETPLACE FACILITATOR DEMONSTRATES ANY OF THE FOLLOWING TO THE SATISFACTION OF THE DEPARTMENT: 1. THE FAILURE TO PAY THE CORRECT AMOUNT OF TAX WAS DUE TO INCORRECT INFORMATION GIVEN TO THE MARKETPLACE FACILITATOR BY THE MARKETPLACE SELLER, AND THE MARKETPLACE FACILITATOR AND THE MARKETPLACE SELLER ARE NOT AFFILIATED PERSONS. 2. THE MARKETPLACE FACILITATOR AND THE MARKETPLACE SELLER ARE NOT AFFILIATED PERSONS, AND THE FAILURE TO PAY THE CORRECT AMOUNT OF TAX WAS DUE TO AN ERROR OTHER THAN AN ERROR IN SOURCING THE SALE UNDER SECTION 42-5040.

Colorado HB 19-1240:

(b) (I) IF A MARKETPLACE FACILITATOR DEMONSTRATES TO THE SATISFACTION OF THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF REVENUE THAT THE MARKETPLACE FACILITATOR MADE A REASONABLE EFFORT TO OBTAIN ACCURATE INFORMATION REGARDING THE OBLIGATION TO COLLECT TAX FROM THE MARKETPLACE SELLER AND THAT THE FAILURE TO COLLECT TAX ON ANY TANGIBLE PERSONAL PROPERTY, COMMODITIES, OR SERVICES SOLD WAS DUE TO INCORRECT INFORMATION PROVIDED TO THE MARKETPLACE FACILITATOR BY THE MARKETPLACE SELLER, THEN THE MARKETPLACE FACILITATOR, BUT NOT THE MARKETPLACE SELLER, IS RELIEVED

OF LIABILITY UNDER THIS SECTION FOR THE AMOUNT OF THE TAX THE MARKETPLACE FACILITATOR FAILED TO COLLECT, PLUS APPLICABLE PENALTIES AND INTEREST.

(II) IF A MARKETPLACE FACILITATOR IS RELIEVED OF LIABILITY UNDER SUBSECTION (3)(b)(I) OF THIS SECTION, THE MARKETPLACE SELLER IS LIABLE UNDER THIS SECTION FOR THE AMOUNT OF TAX THE MARKETPLACE FACILITATOR FAILED TO COLLECT, PLUS APPLICABLE PENALTIES AND INTEREST.

(III) THIS SUBSECTION (3)(b) DOES NOT APPLY TO ANY SALE BY A MARKETPLACE FACILITATOR THAT IS NOT FACILITATED ON BEHALF OF A MARKETPLACE SELLER OR THAT IS FACILITATED ON BEHALF OF A MARKETPLACE SELLER WHO IS AN AFFILIATE OF THE MARKETPLACE FACILITATOR.

Maine 2019 HP 1064:

E. A marketplace facilitator is relieved of liability under this section for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect information given to the marketplace facilitator by the marketplace seller, except that this paragraph does not apply if the marketplace facilitator and the marketplace seller are members of an affiliated group as defined in section 5102, subsection 1-B.

Other states (see AR CA ID IL IN MD MN ND NE NY OH TX UT WI) expand the liability protection for marketplace facilitators/providers to include the marketplace facilitator/provider demonstrating that the failure to collect was due to the unaffiliated marketplace seller providing insufficient or incorrect information to the marketplace facilitator/provider. Examples of such statutes are provided below:

Arkansas 2019 SB 576:

(f)(1) A marketplace facilitator is relieved of liability under this section for failure to collect and remit the correct amount of tax under this section to the extent that the failure was due to incorrect or insufficient information given to the marketplace facilitator by the marketplace seller.

(2) This subsection does not apply if the marketplace facilitator and the marketplace seller are related.

California 2019 AB 147:

6046. If the marketplace facilitator demonstrates to the satisfaction of the department that the marketplace facilitator has made a reasonable effort to obtain accurate and complete information from an unrelated marketplace seller about a retail sale and that the failure to remit the correct amount of tax imposed under this part was due to incorrect or incomplete information provided to the marketplace facilitator by the unrelated marketplace seller, then the marketplace facilitator shall be relieved of liability for the tax for that retail sale. This section does not apply with regard to a retail sale for which the marketplace facilitator is the retailer selling or making the sale of the tangible personal property on its own behalf or if the marketplace facilitator and marketplace seller are related.

Indiana 2019 HEA 1001, p. 143:

(b) For calendar years beginning after December 31, 2021, except in cases in which the marketplace facilitator and the seller are affiliated, a marketplace facilitator is not liable under this section for failure to collect and remit gross retail and use taxes if the marketplace facilitator demonstrates to the satisfaction of the department that: (1) the marketplace facilitator has a system in place to require the seller to provide accurate information and has made a reasonable effort to obtain accurate information from the seller about a retail transaction; (2) the failure to collect and remit the correct tax was due to incorrect or insufficient information provided to the marketplace facilitator by the seller; and (3) the marketplace facilitator provides information showing who the purchaser was in each transaction for which the tax had not been collected. If the marketplace facilitator is relieved of liability under this subsection, the purchaser is liable for any amount of uncollected, unpaid, or unremitted tax.

Massachusetts has extended liability protection for marketplace facilitators/providers for failure to collect to also include certain erroneous information provided to the marketplace facilitator/provider by the purchaser or the Commonwealth itself.

Massachusetts 2019 H 4000:

A marketplace facilitator shall be relieved from liability, including penalties and interest, for the incorrect collection or remittance of sales and use tax on transactions it facilitates or for which it is the seller if the error is due to reasonable reliance on (i) an invalid exemption certificate provided by the marketplace seller or the purchaser; (ii) incorrect information provided by the commonwealth; or (iii) incorrect information provided by the marketplace seller or purchaser regarding the tax classification or proper sourcing of an item or transaction, provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain accurate information from the marketplace seller or purchaser.

Virginia has also extended the circumstances when liability protection is provided to the marketplace facilitator/provider, including an invalid exemption certificate from the purchaser, and erroneous information from the Commonwealth. However, Virginia has limited the circumstances when liability protection is provided due to erroneous information from the marketplace seller. The protection for such erroneous information only includes tax classification or sourcing.

Virginia H 1722:

E. A marketplace facilitator shall be relieved from liability, including penalties and interest, for the incorrect collection or remittance of sales and use tax on transactions it facilitates or for which it is the seller if the error is due to reasonable reliance on (i) an invalid exemption certificate provided by the marketplace seller or the purchaser; (ii) incorrect or insufficient information provided by the Commonwealth; or (iii) incorrect or insufficient information provided by the marketplace seller or purchaser regarding the tax classification or proper sourcing of an item or transaction, provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain accurate information from the marketplace seller or purchaser. The relief from liability afforded to the marketplace facilitator pursuant to this subsection shall not exceed the total amount of tax due from the marketplace facilitator on the incorrect transaction independent of any penalties or interest that would have otherwise applied. Any deficiency resulting from incorrect information provided by the marketplace seller or as the result of an audit shall be the liability of the marketplace seller

. . . .

2. Notwithstanding subdivision 1, any remote seller or marketplace facilitator that has collected an incorrect amount of sales and use tax shall be relieved from liability for such amount, including any penalty or interest, if the error is a result of the remote seller's or marketplace facilitator's reasonable reliance on information provided by the Commonwealth.

If liability protection for errors is provided to marketplace facilitator/providers, should it also be extended to marketplace sellers?

Consideration should be given to providing clear, specific guidance on which party is responsible for the accuracy of the various types information required for proper collection and remittance of sales/use tax.

Recordkeeping Requirements

As previously mentioned, for states that include the marketplace facilitator/provider within the definition of seller/retailer/vendor, the marketplace facilitator/provider would be subject to the recordkeeping requirements that apply to a seller/retailer/vendor. However, some of the state have also expressly included recordkeeping requirements on marketplace sellers. Examples of recordkeeping requirements are provided below.

Illinois 2019 SB 689:

(e) A marketplace seller shall retain books and records for all sales made through a marketplace in accordance with the requirements of Section 11.

Texas 2019 HB 1525:

(e) A marketplace seller shall retain records for all marketplace sales as required by Section [151.025](#).

West Virginia 2019 HB 2813:

(d) Record keeping. — In addition to other applicable record keeping requirements, the Tax Commissioner may require a marketplace facilitator or referrer to provide or make available to the Tax Commissioner any information the commissioner determines is reasonably necessary to enforce the provisions of §11-15A-1 et seq. of this code. Such information may include documentation of sales made by marketplace sellers through the marketplace facilitator's physical or electronic marketplace or directly resulting from a referral by the referrer. The Tax Commissioner may prescribe by procedural rule promulgate, as provided in §29A-3-1 et seq. of this code, the form and manner for providing this information.

The NACSP has made the following suggestions concerning “Maintaining Records” and “Audit Issues.”

Maintaining Records

Non SST States

- Provide clear guidelines outlining the data that remote retailers should maintain and how long that data should be retained.

Audit Issues

Non SST States

- Develop audit standards and procedures that recognize the unique situation of remote sellers.
- When auditing a seller that utilizes a CSP, direct audit inquiries to the CSP.
- Consider participating with the Streamlined States when conducting audits of CSPs.

The RILA Model suggests the following provision dealing with marketplace facilitator/provider audit exposure and liability protection:

The [department] shall solely audit the marketplace facilitator for sales made by marketplace sellers but facilitated by the marketplace facilitator, except with respect to transactions that are subject to Section 1.C. The [department] will not audit or otherwise assess tax against marketplace sellers for sales facilitated by a marketplace facilitator except to the extent the marketplace facilitator seeks relief under section (H) or with respect to transactions that are subject to Section 1.C or 1.D.

- H. A marketplace facilitator shall be relieved of liability under this [section] for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect or insufficient information given to the marketplace facilitator by the marketplace seller, provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain correct and sufficient information from the marketplace seller. Provided, however, this [subsection] shall not apply if the marketplace facilitator and the marketplace seller are related as defined in [cite code section].

4. Marketplace seller-marketplace facilitator/provider information requirements

In situations when the marketplace seller retains responsibility for tax compliance, should the marketplace seller receive adequate information from the marketplace facilitator on marketplace transactions to allow for compliance with other tax laws? Should clear guidelines exist as to the information each party must provide to the other in order for the obligated party to correctly collect and report tax?

Examples of information requirements imposed on marketplace sellers are provided below.

Illinois 2019 SB 689:

- (f) A marketplace seller shall furnish to the marketplace facilitator information that is necessary for the marketplace facilitator to correctly collect and remit taxes for a retail

sale. The information may include a certification that an item being sold is taxable, not taxable, exempt from taxation, or taxable at a specified rate. A marketplace seller shall be held harmless for liability for the tax imposed under this Act when a marketplace facilitator fails to correctly collect and remit tax after having been provided with information by a marketplace seller to correctly collect and remit taxes imposed under this Act.

Texas 2019 H 1525:

(f) A marketplace seller shall furnish to the marketplace provider information that is required to correctly collect and remit taxes imposed by this chapter. The information may include a certification of taxability that an item being sold is a taxable item, is not a taxable item, or is exempt from taxation.